COPY

FILED
NOV 30 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

No. 65

THE UNITED STATES,

Petitioner,

v.

BINGHAMTON CONSTRUCTION CO. INC.

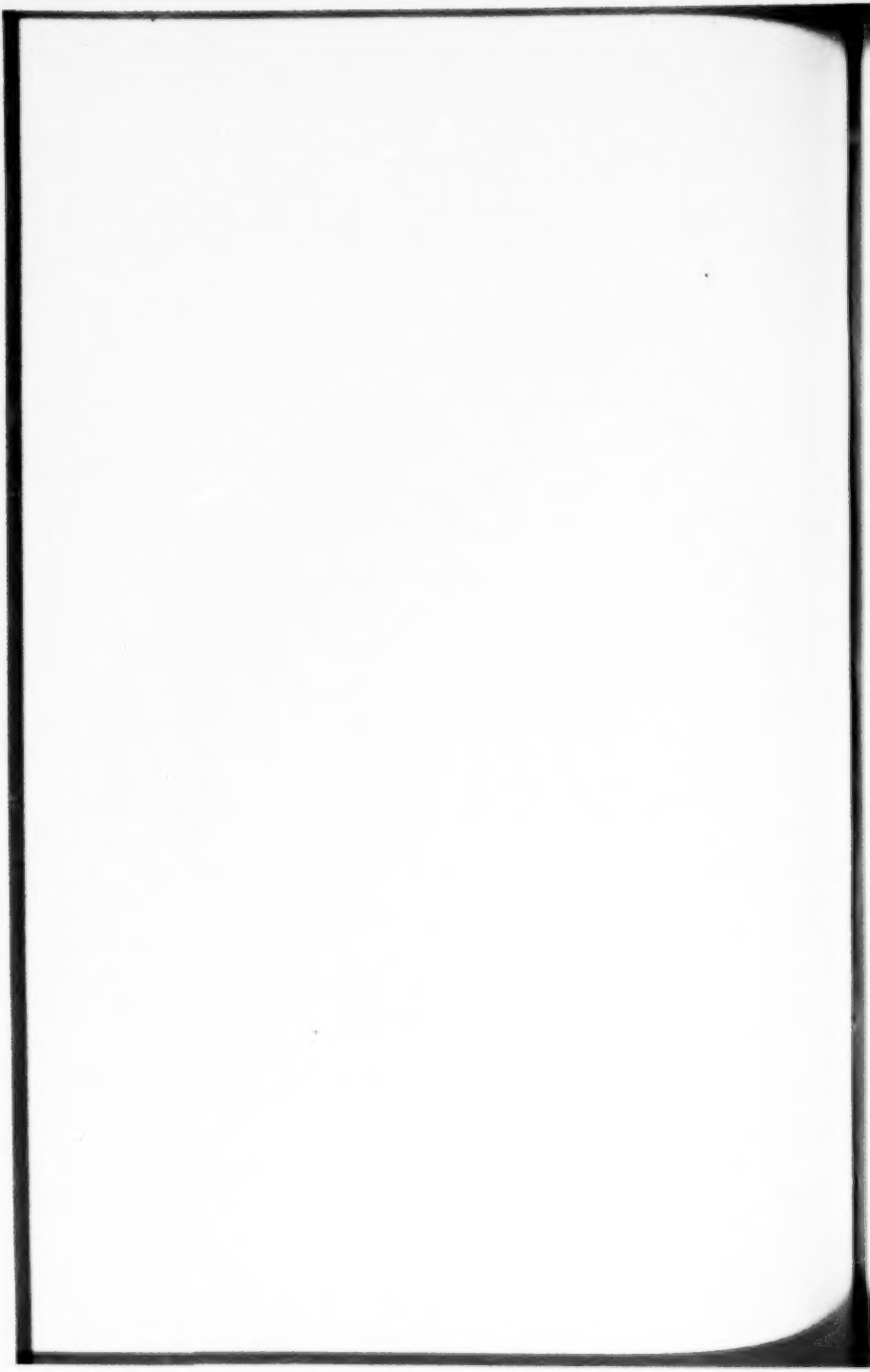
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF FOR BINGHAMTON CONSTRUCTION CO. INC. RESPONDENT ABOVE NAMED.

JEROME BEAUDRIAS,
Attorney for Binghamton Construction Co. Inc., Respondent,
Office & P. O. Address,
83-85 Warburton Ave.,
Yonkers 2, New York.

MALCOLM A. MACINTYRE,
of Counsel.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689



BLEED THROUGH- POOR COPY

INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	3
Departmental Regulation Involved	3
Provisions of the Contract Involved	5
Statement	5
Specification of Errors to Be Urged	9
Summary of Argument	10

ARGUMENT:

I. The failure of the Contracting Officer to conform the Contract Wage Schedule to the wage determination of March 4, 1941 resulted in a Contract misrepresentation that justifies the Court of Claims award to respondent 14

II. Having ruled that the wage rate of $.50 per hour for Common Labor shown by the erroneous Contract Wage Schedule, was a misrepresentation for which respondent could recover damages,—the Court below erred in awarding less than one half of the damages caused by said misrepresentation 19

III. The wage determination of January 31, 1941, incorporated in the subject Contract, did not comply with the requirements of the Davis-Bacon Act 22

Conclusion 26

BLURRED COPY

CITATIONS.

PAGE

Cases:

Albert & Harrison Inc. v. United States, 107 C. Cls. 292, 68 Fed. Sup. 732, certiorari denied, 331 U. S. 810 14

A. J. Paretta Co. v. United States, 109 C. Cls. 324, certiorari denied 333 U. S. 32 17

Christie v. United States, 237 U. S. 234 16

Hallerbach v. United States, 233 U. S. 165 16

Kingston, et al. v. L. P. & J. A. Smith Co., 114 Fed. Rep. 294 17

United States v. Atlantic Dredging Co., 253 U. S. 1 17
United States v. Spearin, 248 U. S. 132 16
United States v. Utah Stage Co., 199 U. S. 414 16

STATUTES AND REGULATIONS.

The Davis-Bacon Act (Act of August 30, 1935) 49 Stat. 1011, 40 U. S. C. 276a & 276a-1 23

Department of Labor—Regulation #503 23

BLEED THROUGH- POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 65

THE UNITED STATES,

Petitioner,

v.

BINGHAMTON CONSTRUCTION CO. INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF FOR BINGHAMTON CONSTRUCTION CO. INC. RESPONDENT ABOVE NAMED.

Opinion Below.

The opinion of the Court of Claims of The United States was rendered on October 7, 1952, and is reported at 123 C. Cls. 804, 107 Fed. Supp. 712.

Jurisdiction.

The judgment of the Court of Claims was filed October 7, 1952 (R. 72).

BLURRED COPY

The Government's petition for a Writ of Certiorari was filed May 12, 1953 (R. 73) and was granted on October 12, 1953 (R. 75).

The Respondent's cross petition for a Writ of Certiorari upon the questions under review in the within proceeding, and upon other issues, was filed May 18, 1953, as proceeding No. 78, October Term, 1953 (R. 74) and has not yet been decided.

The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

Questions Presented.

1. Whether the statutory obligation of the Secretary of Labor to ascertain and submit for incorporation in the subject Contract, the wage rates prevailing in the Contract area, coupled with the positive assertion in the Contract that said duty had been duly performed, justified Respondent's reliance upon the accuracy of said wage rates in the preparation of its bid for the Contract, and rendered unnecessary its duplication of an investigation that allegedly had already been made.

2. Whether the preparation of the Contract's defective Wage Schedule from insufficient and erroneous data furnished by the Contracting Officer to the Labor Department, was adequate compliance with the provisions of the Davis-Bacon Act, in view of the promulgation by the Secretary of Labor of Regulation 503, specifying the procedure to be followed in complying with the statute.

3. Whether Respondent's damages for contract misrepresentation should be limited to the difference between the erroneous rates set forth in the Contract Wage Schedule and the amended rates set forth in the Secretary of

BLEED THROUGH– POOR COPY

Labor's Wage Determination of March 4, 1941, in view of the fact that in making said determination, the Secretary of Labor specifically limited the effective term of said ruling to a period of ninety (90) days ending June 2, 1941, the day prior to the final approval and award of the subject Contract to Respondent,—and also, that admittedly, from April 1, 1941 until June of 1942, the prevailing rate for Common Labor was $.625 per hour, or $.075 per hour higher than the $.55 per hour rate found to be prevailing by the said Determination of March 4, 1941.

Statute Involved.

Act of August 30, 1935, 49 Stat. 1011 (U. S. Code, Title 40, Secs. 276a & 276a-1) commonly known as the Davis-Bacon Act, the pertinent portions of which direct that the advertised specifications for every Federal contract for public improvement costing in excess of $2,000.00, upon which mechanics and/or laborers are employed,——

> "shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics, which shall be based upon the wages that *will be determined by the Secretary of Labor, to be prevailing* for the corresponding classes of laborers and mechanics employed in projects of a character similar to the contract work, in the—civil subdivision of the State—in which the work is to be performed." (Emphasis added.)

Departmental Regulation Involved.

Labor Department Regulation 503 relates to the manner of compliance by the Labor Department with the Davis-Bacon Act, and may be briefly summarized as follows,—

BLURRED COPY

Section 1—that all requests by Contracting Officers be referred to the Solicitor of Labor, who shall obtain the evidence for the Secretary's predetermination.

Section 2—sets forth the rules for determining what wage rates are prevailing in any given area.

Section 3—defines the preliminary information to be collected by the Solicitor from the department files.

Section 4—provides, that if data on file is insufficient, the Solicitor shall appoint a referee to conduct a field investigation and report.

Section 5a—Lists as those who may be appointed referee,—Labor Department employees, and also qualified persons not employed by the Labor Department, who are approved by the Secretary,—but said list *does not include* any employee of the War Department.

Sections 6 to 20 incl.—define the duties of the referee, the scope of the inquiry, the sources of information to be investigated, the holding of a public hearing, and the procedure with respect thereto, and instructions for the preparation of the referee's report.

Section 21—provides that this regulation supersedes all prior instructions.

Section 22—(not applicable to this case—did not become effective until 2/3/42).

Said Regulation 503 was prescribed by the Secretary of Labor, following the amendment on August 30, 1935, of the Davis-Bacon Act (Public Law No. 403, 74th Congress);

BLEED THROUGH– POOR COPY

became effective on September 30, 1935; and was in full force and effect in 1940 and 1941, when the subject Contract was advertised and let.

Provisions of the Contract Involved.

These are Article 17 of the Contract; Paragraph 1-31 of the Specifications; and Paragraph 1-12 of the Invitation to Bid for the subject Contract (Pltf's Ex. 1-A), as quoted in Petitioner's brief, *except for the omission* of a reference notation appearing at the end of Paragraph 1-12 of the Invitation to Bid, clearly showing that beyond satisfying themselves of the *"availability"* of labor, the investigation urged upon prospective bidders related to the matters described in the Specifications under the following paragraph headings,—

"1-12. *Local Materials and Facilities.*— * * * "
"1-13. *Physical Data.*— * * * "
"1-14. *Work Areas.*— * * * "

With said notation added, the final sentence of Paragraph 1-12 of the Invitation to Bid (Pltf's Ex. 1-A) is as follows,—

> " * * *. Failure to acquaint himself with all available information concerning these conditions will not relieve the successful bidder of responsibility for estimating the difficulties and costs of successfully performing the complete work. (See paragraphs 1-12, 1-13, and 1-14 of the specifications.)"

Statement.

On *January 1, 1941,* in Elmira, New York, where the subject Contract was performed, the union scale for Car-

BLURRED COPY

penters was increased from $1.00 to $1.125 an hour, per the advance notice of said rate increase, sent on October 22, 1940 by the union to the District Engineer (R. 43, Finding 7).

The union scale for Laborers and Concrete Puddlers was $.55 per hour (Tr. Streeter 554).

On *January 22, 1941,* the Contracting Officer applied to the Secretary of Labor for a Wage Schedule to be incorporated in the subject Contract, and with said application, submitted his "Opinion" as to the Wage Rate prevailing in Elmira for each craft, based upon a field investigation allegedly made by him for that purpose and the details of which were incorporated in a written report submitted for each craft. The Contracting Officer erroneously found the prevailing Wage Rate for Carpenters to be $1.00 per hour, and for Laborers (including Concrete Puddlers) $.50 per hour (Deft's Ex. 1, Item 5).

On *January 31, 1941,* the Secretary of Labor responded by submitting a Wage Schedule that incorporated, *without change,* the rates recommended by the Contracting Officer, including therein the erroneous rates shown above for Carpenters and Laborers (R. 44, Finding 8).

On *February 18, 1941,* in response to a request for a Wage Schedule to be incorporated in the contract for a Federal Housing Project at Elmira, the Secretary of Labor, *pursuant to Regulation 503* of the Department of Labor, caused an investigation as to the Wage Rates prevailing in Elmira, to be made by a duly appointed Referee (R. 44, Finding 9 & Pltf's Ex. 27).

On *March 4, 1941,* following receipt of said Referee's report, the Secretary of Labor issued a Wage Determination for the Elmira Area, wherein the prevailing wage rate for Carpenters was found to be $1.125 per hour and for

BLEED THROUGH– POOR COPY

Laborers (including Concrete Puddlers) $.55 per hour (R. 44, Finding 9 & Pltf's Ex. 27).

Said Wage Determination by the Secretary of Labor contains the following preliminary statement,—

> "Since the prevailing rates of wages for the requested classifications re laborers and mechanics in the vicinity of Elmira *have not been determined recently under the Act,* the Secretary of Labor, in accordance with Department Regulations (Reg. 503, dated 9/30/35), appointed a referee to investigate the wages paid on such work in that locality. In the course of his investigation at Elmira and vicinity, the Referee interviewed various representatives of labor, contractors, local public officials and other parties believed to be interested." (Emphasis added.)

and the following ruling, to wit,—

> "*These rates are to be considered prevailing for ninety days from the date of this decision,* unless the decision is changed prior to the expiration of that period for contracts unawarded at that time." (Emphasis added.)

In issuing over her signature on January 31, 1941, the defective Wage Schedule [Pltf's Ex. 1(10)] incorporated in Respondent's Contract, the Secretary of Labor *did not state* that she had appointed the Contracting Officer a referee to investigate and report as to the wage rates prevailing in Elmira. Furthermore, the Contracting Officer admitted on cross-examination, that he had no authority to act for the Secretary of Labor (Tr. Marshall, p. 708).

On *March 29, 1941,* nearly four (4) weeks later, the subject Contract was advertised for bids, without correction

BLURRED COPY

of the Wage Schedule therein to conform to the Scretary's Wage Determination of March 4, 1941.

On *April 1, 1941,* the union scale for Laborers and Concrete Puddlers was increased from $.55 to $.625 an hour (R. 44, Finding 10).

On *April 29, 1941,* the Contracting Officer accepted bids on the subject Contract, without notifying the bidders of the errors in the Wage Schedule, or of the further rate increase for Laborers effective April 1, 1941,—although Carpenters and Laborers constituted the bulk of the labor force required to perform the Contract.

On *May 14, 1941* the Contracting Officer awarded the subject Contract to Respondent as the lowest bidder, subject to acceptance and approval by the War Department Division Engineer for the North Atlantic Division (R. 42, Finding 2).

On *June 3, 1941* the Contract was accepted and became binding upon the Government (R. 42, Finding 2), still without amendment of the Wage Schedule, despite the fact that *more than four* (4) *months had elapsed* since January 31, 1941, when said Wage Schedule had been obtained from the Secretary of Labor, and in the interim, the new Wage Determination of March 4, 1941, had been issued, and the Wage Rate for Laborers had been further increased on April 1, 1941.

On *June 5, 1941,* Respondent received formal notice to proceed with the work (R. 42, Finding 2).

On *June 16, 1941,* Respondent formally protested to the Contracting Officer, the errors in the Contract Wage Schedule and its inability to obtain Carpenters for less than $1.125 per hour, or Laborers and Concrete Puddlers for less than $.625 per hour (R. 44, Finding 11), the rates then prevailing in Elmira.

BLEED THROUGH– POOR COPY

When Respondent's protest and demand for an adjustment of compensation was rejected by the Contracting Officer, and said rejection was affirmed by the Chief of Engineers,—Respondent, following completion of the Contract, brought suit in the Court of Claims on various items, including a claim for damages for said contract misrepresentation, in the sum of $15,597.38, that being the difference in Respondent's labor cost, due to payment for Carpenters at the rate of $1.125 per hour instead of $1.00, and Common Labor at the rate of $.625 per hour instead of $.50 per hour.

Attention is called to the fact that *in 1942,* the rate for Carpenters employed on the subject Contract increased from $1.125 per hour to $1.25 per hour, and for Common Laborers from $.625 per hour to $.75 per hour.

Although Respondent paid said increased wage rates until the completion of the Contract in December, 1942, it has asserted no claim against the Government for said increased cost, because said rise in rates was one of the hazards that Respondent voluntarily assumed in contracting for the performance of this work (R. 15-16, p. 13).

Specification of Errors to be Urged.

The Court of Claims erred:

1. In holding that the Secretary of Labor's Determination on January 31, 1941 of the Schedule of Wages incorporated in Respondent's Contract, complied with the provisions of the Davis-Bacon Act.

2. In holding that insofar as said Wage Determination found the prevailing wage rate for Carpenters to be $1.00 and for Common Labor (including Concrete Puddlers) to be $.50, said Determination was correct when made.

BLURRED COPY

3. In holding that Respondent failed to establish any of the circumstances surrounding the wage rate increase from $.55 to $.625 obtained by the Union for unskilled Laborers and Concrete Puddlers on April 1, 1941.

4. In holding that it was impossible to determine from the record whether the Contracting Officer knew or should have known of said wage rate increase of April 1, 1941, at the time he awarded the subject Contract to Respondent.

5. In refusing to award Respondent the additional damages of $6,071.94 suffered by it by reason of said April 1, 1941 wage rate increase.

6. In refusing to award Respondent additional compensation of $19,924.40 per work performed and materials furnished in the completion of the subject Contract, on claims that are the subject of Respondent's collateral cross-petition for Writ of Certiorari, now pending before this Honorable Court, and not yet decided.

Summary of Argument.

Petitioner's entire brief and argument are predicated upon a misconception of Respondent's claim for damages, and of the Court of Claims' reasons for the partial award to Respondent.

There is and can be no dispute that the purpose of the Davis-Bacon Act and of the inclusion in the subject Contract and similar contracts, of a schedule of minimum wages to be paid employees,—was to benefit labor by placing a floor under wages and thus protect workers against sub-standard earnings.

BLEED THROUGH– POOR COPY

Furthermore, Respondent never has, and does not now, assert that the inclusion of said Wage Schedule in its Contract, was a warranty or representation by the Government, that Respondent could perform and complete the Contract at a labor cost measured by the wage rates therein set forth,—and in proof thereof, attention is called to the fact that although in June of 1942, the wage rate for Carpenters was increased from $1.125 to $1.25, and for Laborers from $.625 to $.75, and Respondent was obliged to pay said increased rates until the completion of the Contract in December of 1942, no claim has ever been asserted against the Government for said added and unanticipated cost.

We do contend, however, that upon the Secretary of Labor, and her designees, as enumerated in Section 5(a) of Labor Department Regulation #503, rested the obligation of ascertaining and incorporating in Respondent's Contract, the wage rates prevailing in the Contract area. We are certain that if a field investigation of the thoroughness called for by Regulation 503, had been made in preparation for the subject Contract, no errors in rates would have occurred,—and the accuracy of the Wage Determination of March 4, 1941, resulting from a thorough field survey by a qualified Referee, strongly supports that view.

We do not believe that the alleged survey and report of prevailing wage rates, furnished to the Labor Department by the Contracting Officer, and upon which the Wage Schedule for the subject Contract was based, was a satisfactory or legal substitute for the investigation called for by Regulation 503, or satisfied either the letter or the intent of the Davis-Bacon Act,—and we submit that the appointment in February, 1941 by the Secretary of Labor, of a Referee to make a proper survey of the Contract area, and the act of the Secretary in making a new wage determination for said area on March 4, 1941 (only thirty-

BLURRED COPY

two days after her ruling of January 31, 1941, issuing the Wage Schedule incorporated in Respondent's Contract), and finally, the opening statement inserted in said Determination of March 4, 1941, to the effect that prevailing wage rates in said area had not been recently determined "under the Act",—strongly support our belief that with respect to the subject Contract, the measures taken to comply with the statute *were void ab initio.*

However, until the trial of this action, Respondent had no reason to suspect that the wage rates in the Contract Wage Schedule were not the product of the thoroughgoing investigation directed by the Act and by Regulation 503,—but on the contrary regarded the statements contained in Article 17 of the Contract and Paragraph 1-31 of the Specifications, as affirmative representations that the statutory requirements had been duly complied with.

Therefore, since to Respondent's knowledge, the supply of labor in all of the required classifications was adequate, Respondent did not make an independent check of prevailing wage rates, but relied upon the Contract Wage Schedule as being an accurate statement of the rates being paid to the great majority of workers in each labor classification.

We submit that the contractor was entitled to rely upon said data in computing his bid, since there was no reason to believe that in a matter so vital to the interests of employees that the Legislature has sought to protect, there would be anything less than the greatest care exercised.

Certainly, as Petitioner's counsel has pointed out in his brief, and as the Court below found in its decision (R. 45, Finding 16), Respondent could have made an independent check of prevailing wage rates,—but obviously no investigation less thorough than the one that had presumably been already made by the Secretary of Labor, would be

BLEED THROUGH– POOR COPY

of any value for comparison with the rates set forth in the Contract.

Under the circumstances, we contend that Respondent was altogether justified in its decision not to make any such independent investigation, but instead, to rely upon the truth and accuracy of the Contract Wage Scale.

We further contend, and the Court below has concurred with us, that when, at the commencement of Contract operations, it was discovered that the prevailing scale for Carpenters and for Common Labor was, and had been for more than two months, $1.125 and $.625 respectively, instead of $1.00 and $.50 respectively as set forth in the Contract, we were entitled to claim a Contract misrepresentation entitling us to damages measured by the difference between Respondent's labor cost computed at the said prevailing rates of $1.125 for Carpenters and $.625 for labor, and what said cost would have been if same had been computed at the rate of $1.00 an hour for Carpenters and $.50 for labor.

The Court below concurred in our claim of Contract misrepresentation, but would award to Respondent as damages, only the difference between $1.00 and $1.125 for Carpenters and $.50 and $.55 for Common Labor, upon the ground that the Contracting Officer knew or should have known of the Secretary of Labor's second Wage Determination of March 4, 1941, and should have incorporated same in Respondent's Contract. Its failure to do so entitled Respondent to recover to that extent, and the Court below thereupon awarded to Respondent, $7,363.22 for said damages.

The Court below, however, refused to allow Respondent the additional damages of $6,071.94 claimed by Respondent because on April 1, 1941 (three weeks after the Wage Determination of March 4, 1941, had found the prevailing

BLURRED COPY

rate for Common Labor to be $.55 per hour) said Common Labor rate was increased to $.625 per hour.

Respondent contended, that since said increase had occurred more than two months prior to the final approval and award of the Contract on June 3, 1941, the Contracting Officer knew, or should have known of said increase, and should have taken action to amend the schedule accordingly.

The Court below, however, refused to grant the relief demanded, and under Point II of this Memorandum, we have discussed the reasons why we believe this Honorable Court should reverse its decision and grant Respondent said additional damages.

ARGUMENT.

I.

The failure of the Contracting Officer to conform the Contract Wage Schedule to the wage determination of March 4, 1941 resulted in a Contract misrepresentation that justifies the Court of Claims award to respondent.

A leading authority and case in point is,—

> *Albert & Harrison Inc.* v. *United States,* 107 C. Cls. 292, 68 Fed. Sup. 732 Certiorari denied 331 U. S. 810.

In said case, the advertised specifications contained a wage schedule wherein the rate for bricklayers was shown to be $1.50 per hour.

However, subsequent to inviting bids, but prior to the award of the Contract, a new wage determination was made for the contract area, wherein the prevailing rate

BLEED THROUGH– POOR COPY

for bricklayers was found to be $1.75 per hour. The Court held that the Contracting Officer's failure to correct the contract wage schedule to show said increased rate, constituted a contract misrepresentation for which plaintiff was awarded damages.

In the following respects, the facts pertaining to Respondent's wage claim, are more favorable to a recovery than those found sufficient for an award in the cited case,—

1. *In the cited case*—the contract wage schedule was true when made.
   In this case—when the original Wage Determination was made on January 31, 1941, the prevailing rates for Carpenters and Common Labor were higher than those shown in the Contract Wage Scale.

2. *In the cited case*—the Contract recited that the Secretary of Labor's Wage Determination had been made October 26, 1940. Therefore, when plaintiff bid for the contract in March of 1941, he had notice that 5 months had elapsed since said Determination had been made, with consequent opportunity to check prevailing rates had he desired to do so.
   In this case—there was nothing in the subject Contract to indicate when the Contract Wage Schedule had been determined, and no reason for Respondent to suspect that same might be out of date.

3. *In the cited case*—the new wage determination increasing the scale for bricklayers to $1.75 per hour, occurred only 19 days prior to the award of that contract, a time sufficiently short so that the Contracting Officer might be excused for failure to learn of same.

BLURRED COPY

In this case—the Wage Determination of March 4, 1941 and the subsequent increase in Common Labor rates that occurred on April 1, 1941, occurred from 6 to 10 weeks prior to the conditional award of the Contract to Respondent on May 14, 1941, and from 9 to 13 weeks prior to the final approval of same on June 3, 1941, during which period of time, the Contracting Officer learned or should have learned of said rate changes.

4. *In the cited case*—the Court found that the contractor did not even visit the site of the work prior to the submission of its bid, but found that fact no obstacle to the granting of an award. *In this case*—Respondent's officers examined the contract site prior to bidding, but saw no need to repeat an investigation of prevailing wage rates that they believed had already been exhaustively made by the Secretary of Labor.

Although counsel for the Government, in his brief, charges that Respondent was fatally remiss in failing to investigate independently, the wage rates prevailing in the Contract area, it has repeatedly been held that a contractor should not be deemed negligent in accepting as true, without independent examination, the results incorporated in a contract, of an investigation made by the owner.

Hallerbach v. *United States,* 233 U. S. 165, 172;
Christie v. *United States,* 237 U. S. 234, 242;
United States v. *Spearin,* 248 U. S. 132, 136;
United States v. *Utah Stage Co.,* 199 U. S. 414, 424.

BLEED THROUGH– POOR COPY

To the same effect, see:

United States v. *Atlantic Dredging Co.*, 253 U. S. 1;

Kingston, et al v. *L. P. & J. A. Smith Co.* (C. C. A. 6th Circuit) 114 Fed. Rep. 294

That the Petitioner has generally recognized and acknowledged the existence of this principle, is evidenced by a fact of which we respectfully submit the Court may take judicial notice, to wit,—that *shortly after the letting of the subject Contract,* the United States Government's standard form of contract and specifications, used for the subject Contract, was amended to include the following notice,—

> "The contractor will be expected to make his own investigations and determine for himself the wage rates which may prevail during the period of the contract. Wage rates which may be found to exceed the minimum herein set forth, will not be a basis for claim against the United States for added costs."

Attention is also respectfully called to the following citation by Petitioner's counsel, at page 28 of his brief, to wit,—

A. J. Paretta Co. v. *United States,* 109 C. Cls. 324 Certiorari denied, 333 U. S. 832.

In said case, the contract under review was awarded on November 25, 1942, approximately a month prior to the completion of Respondent's Contract, and the wage provisions therein set forth contained the following specific warning,—

BLURRED COPY

> "The specified wage rates are minimum rates only, and the Government will not consider any claim for additional compensation made by the contractor because of payment by the contractor of any wage rate in excess of the applicable rate contained herein. All disputes in regard to the payment of wages in excess of those specified herein shall be adjusted by the contractor."

We respectfully submit, that if for the contract given to the A. J. Paretta Co., the Government deemed the inclusion of said warning clause necessary, to cast upon the contractor the burden of making his own investigation of prevailing wage rates,—there is no basis for the arguments of Petitioner's counsel, that Respondent's Contract, *devoid of any such warning clause,* nevertheless casts the same burden upon Respondent.

Under Point II of his brief, counsel for Petitioner argues that the Wage Determination of March 4, 1941, having been prepared and issued for inclusion in a Federal Housing Contract, may not also be regarded as superseding the erroneous Wage Determination of January 31, 1941 incorporated in the subject Contract, without the specific consent and agreement of the Secretary of Labor.

However, said arguments disregard the statement in said March 4th Determination (Pltf's Ex. 27), that the rates therein set forth are to be considered prevailing "for ninety days from the date of this decision, unless the decision is changed prior to the expiration of that period *for contracts unawarded at that time*". (Emphasis added.)

Petitioner's counsel also suggests that Carpenters employed upon the said Housing Contract, might well require a degree of skill greater than that needed by Carpenters

BLEED THROUGH– POOR COPY

engaged in building forms for concrete structures, and therefore, be entitled to receive a higher rate of pay. However, Respondent's witness Warren Morgan Mayhood, Recording Secretary and Business Agent for Carpenters Local Union No. 532 of Elmira, N. Y. (Tr. 1186), testified upon the trial of this action, that in the trade of "Carpentry", there are only five (5) wage differentials recognized or permitted by the Union, to wit,—the agreed Union wage rate paid to *all* Journeymen-Carpenters, and the varying percentages thereof paid to First, Second, Third and Fourth year Apprentices (Tr. 1196-1198).

We respectfully submit, that for all of the foregoing reasons, the Government's Petition should be dismissed.

II.

Having ruled that the wage rate of $.50 per hour for Common Labor shown by the erroneous Contract Wage Schedule, was a misrepresentation for which respondent could recover damages,—the Court below erred in awarding less than one half of the damages caused by said misrepresentation.

The Court below awarded Respondent the difference between the erroneous rate of $.50 per hour for Common Labor set forth in the Contract Wage Schedule, and the rate of $.55 per hour found to be prevailing by the Wage Determination of March 4, 1941 (R. 68), upon the premise that on March 29, 1941, when the Contracting Officer advertised for bids on the subject Contract, he knew or should have known, of the Wage Determination of March 4th, and his failure to correct the Contract Wage Schedule to conform to same, constituted a misrepresentation of the true facts (R. 68).

BLURRED COPY

The Court also found, that on and after April 1, 1941, the prevailing wage rate for Common Labor advanced to 62.5¢ per hour, and that Respondent was obliged to pay said increased rate when it started to perform the Contract on June 3, 1941 (R. 44, Finding 11).

However, despite said finding, the Court refused to award Respondent the additional damages caused by said rate increase from 55¢ per hour to 62.5¢ per hour, stating as its reason for said refusal that,—

> "• • • it is impossible to determine whether the District Engineer knew or should have known of its existence (i.e., the increase in rate to 62.5¢) at the time he awarded this contract to plaintiff" (R. 68).

We respectfully submit that the Court's error in so ruling, is demonstrated by the following,—

1. If the District Engineer was chargeable with knowledge of the Wage Determination of March 4, 1941, fixing the Common Labor rate at 55¢ per hour, *he was also chargeable with the knowledge* that in said Wage Determination the Secretary of Labor specifically ruled that,—

> *"These rates are to be considered prevailing for ninety days from the date of this decision* (March 4, 1941), unless the decision is changed *prior* to the expiration of that period for contracts unawarded at that time" (Pltf's Exhibit 27). (Emphasis added.)

Said maximum period of ninety (90) days expired on *June 2, 1941,* and therefore, when Respondent was awarded the Contract *on May 14, 1941* (R. 42, Finding 2) by the District Engineer—*subject to the approval of his superi-*

BLEED THROUGH– POOR COPY

ors—the District Engineer knew, or should have known, that *71 days* of said 90-day period had already expired, and that it would take most, if not all, of the remaining 19 days to obtain said approval.

Therefore, on June 3, 1941, when the Contract became binding upon the parties, through the endorsement thereof by the Division Engineer (R. 8 and R. 42, Finding 2) the Contracting Officer knew, or should have known, that *the Secretary of Labor's March 4th Wage Determination for the Contract Area, had lapsed the previous day.*

Certainly at that time—if not earlier—a due compliance with the letter and intent of the *Davis-Bacon Act,* required that the Contracting Officer apply to the Secretary of Labor for a new wage determination. Had he done so, the Labor Department's investigation would have found a 62.5¢ hourly rate to be prevailing for Common Labor and Respondent's loss need never have occurred.

We respectfully submit that the violation of the statute disclosed by the foregoing undisputed facts, should alone be sufficient to justify Respondent's claim.

2. That the Contracting Officer had personal knowledge,—long before April 1, 1941,—of the Common Labor wage rate increase to 62.5¢ per hour that occurred on that date, is disclosed by the following evidence,—

a. The Contracting Officer's signed Report to the Labor Department, of wage rates prevailing in the Contract area (Deft's Ex. 1, encl. 5), *dated January 10, 1941,* contains the following statement,—

> "* * * The union states it is contemplating a new rate of $0.625 per hr. to be effective April 1, 1941. * * *"

BLURRED COPY

b. Also, Respondent's witness, James F. Doughty, who in 1940 and 1941, was Business Representative of the Elmira Building and Construction Trades Council, testified that on or about November 15, 1940, the Laborers' Local Union No. 1355 of Elmira, N. Y. advised the Contracting Officer by letter, that the wage rate for Common Labor would be increased to 62.5¢ per hour, effective April 1, 1941 (Testimony, pp. 428-429 and 431).

In the light of the foregoing facts, we respectfully submit that the refusal of the Court below to allow Respondent as damages, the difference between the rate of 55¢ for Common Labor found by the decision of March 4, 1941, and the 62½¢ rate that became effective April 1, 1941, because of the failure of the Secretary of Labor to make a Wage Determination acknowledging said increased rate of 62½¢,—is to permit the Government to benefit by the failure and refusal of the Contracting Officer to request such determination, despite the obvious need for same if the provisions of the Davis-Bacon Act were to be complied with.

We therefore respectfully urge that this Court amend the decision of the Court of Claims by awarding to Respondent, the additional damages of $6,071.94 that Respondent is entitled to receive by reason of said labor rate increase of April 1, 1941.

III.

The wage determination of January 31, 1941, incorporated in the subject Contract, did not comply with the requirements of the Davis-Bacon Act.

In substantiation of said charge, the attention of the Court is respectfully called to the following uncontroverted facts,—

BLEED THROUGH– POOR COPY

1. No preliminary Field Investigation and Report of the wage rates prevailing in the Contract area, was made by a duly appointed and qualified referee, as directed by *Regulation 503, Sections 4 and 5 (a)*. Instead, the Wage Schedule incorporated in the subject Contract was predicated upon an alleged field investigation by the *Contracting Officer* (Tr. pp. 700-708), who admittedly had no authority to perform said duty (Tr. p. 708) with which the Secretary of Labor is specifically charged by the *Davis-Bacon Act*, and who very certainly was not one of those designated by *Regulation 503, Section 5(a)* as qualified to engage in the predetermination of prevailing wage rates.

2. In addition to the technical objection that he was not qualified to act,—the Contracting Officer's report of his investigation (Deft's Ex. 1, encl. 5) clearly shows that he made no attempt to conduct his investigation in the manner and with the thoroughness directed by *Regulation 503*, and more particularly, that he neglected to hold the Public Hearing directed by *Sections 11 to 19* inclusive of said Regulation.

3. Moreover, even the inadequate evidence of prevailing wage rates incorporated in the Contracting Officer's said report, became suspect when, upon the trial of this action, James F. Doughty, Business Representative of both the Carpenters Union, Local 532 of Elmira (Tr. p. 425) and of the Elmira Building and Construction Trades Council (Tr., p. 402) at the time said field investigation was allegedly made,—and also Henry W. Streeter, a prominent Elmira contractor, by separate affidavits (attached to Pltf's Ex. 11) and by their sworn testimony, *categorically denied* that they had either held the conferences, or expressed the opinions re prevailing wage

BLURRED COPY

rates, that were reported by the Contracting Officer (Tr. Doughty, pp. 437-438 and 443; Streeter, pp. 563-564).

4. The Secretary of Labor acknowledged the inadequacy of said Wage Determination of January 31, 1941, incorporated in Respondent's Contract when, on March 4, 1941, on issuing a new Wage Determination for the Contract area (Pltf's Ex. 27), she stated in the second paragraph thereof, that her action was taken because the prevailing wage rates for the Elmira area "have not been determined recently *under the Act*". (Emphsis added.)

We respectfully submit that upon the Contracting Officer rested the obligation of complying with the letter and intent of said law, and the foregoing uncontradicted facts demonstrated an indifference to the fulfillment of his duties, that not only resulted in misleading Respondent to its serious loss and damage, but also might well have proved seriously detrimental to the interests of the workmen said law was designed to protect.

We believe that the legal effect of the Contracting Ofcer's actions was to render the Wage Schedule of January 31, 1941 a nullity, and the subject Contract therefore deficient in this essential respect.

Respondent should therefore be entitled to supply said deficiency with the best available evidence, and as hereinbefore shown, upon the trial, adduced testimony establishing without contradiction, that on and after April 1, 1941, more than two months prior to the start of work on the subject Contract, the prevailing scale for Carpenters in the Contract area was $1.125 and for Common Labor was $.625.

The Court below awarded Respondent a portion of its damages, because of the Contracting Officer's failure to

BLEED THROUGH– POOR COPY

amend the Contract Wage Schedule to conform to the Secretary of Labor's March 4, 1941 Wage Determination.

The Court below, however, refused to award Respondent the balance of its damages, amounting to $6,071.94, for the reason that it could not determine whether the Contracting Officer knew or should have known at the time of the award of this Contract to Respondent, that the prevailing wage rates for Common Labor had increased to $.625 some six weeks earlier, and also, there was no evidence of a Wage Determination by the Secretary of Labor, finding said rate to prevail.

We respectfully submit that under Point II of this brief, it has been shown that the record contains a considerable quantity of uncontradicted evidence proving that the Contracting Officer had knowledge of said rate increase.

However, quite apart from said evidence of his knowledge, we submit that the foregoing facts disclose that he knew, or should have known, when he finally awarded the Contract to Respondent on June 3, 1941, that same was lacking a valid Wage Schedule, due to the fact that the original defective schedule, if not *void ab initio,* had been superseded by the second Wage Determination of March 4, 1941,—and said second Wage Determination expired by limitation of time on June 2, 1941, the day prior to the final award of Respondent's Contract.

Had the Contracting Officer been disposed to fulfill his obligations, he should have immediately applied for a new Wage Schedule to be incorporated in the subject Contract, and had he done so, the reasons expressed by the Court below for denying a portion of Respondent's Wage Claim, would have ceased to exist.

That the said Contracting Officer continued to be consistent in refusing to perform his Contract and statutory

BLURRED COPY

obligations, should not be the cause of denying Respondent the recovery of a substantial portion of its loss and damages.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the Government's Petition herein should be dismissed—and that with respect to the judgment of the Court below, action should be deferred until determination of Respondent's cross-petition for a Writ of Certiorari (filed May 18, 1953 as Proceeding No. 78, October Term, 1953), upon both the questions under review in this proceeding, and also Respondent's claims to $19,974.40 of additional compensation to it for work performed and materials furnished in the completion of the subject Contract.

November, 1953.

Respectfully submitted,

JEROME BEAUDRIAS,
Attorney for Binghamton Construction Co. Inc., Respondent,
Office & P. O. Address,
83-85 Warburton Ave.,
Yonkers 2, New York.

MALCOLM A. MACINTYRE,
of Counsel.

BLEED THROUGH– POOR COPY